

The record as specifically set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Whether claimant suffered personal injury by accident on the dates alleged.
- (2) Whether claimant's personal injury by accident arose out of and in the course of his employment with respondent.
- (3) Fund liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having studied the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds that claimant has not proven by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment during the period alleged.

Claimant worked in the same location, in the same plant, from 1970 through July 1991. During the vast majority of this time the plant was owned and operated by Rockwell International. In June 1991, the plant was sold to the current respondent, Atchison Casting Corporation. Claimant was employed by Atchison Casting Corporation from the date of sale, June 14, 1991, through July 16, 1991, claimant's last day at work.

Claimant suffered hearing loss problems for many years prior to 1991. Hearing tests performed on claimant in 1974 indicated bilateral hearing loss. In 1990 a new hearing test showed claimant's hearing had worsened in the previous year. Claimant was again tested in January 1991, indicating further hearing loss. No additional tests were performed until May 1992, nearly a year after claimant's termination of employment with the respondent.

Respondent alleges claimant suffered hearing loss during the period June 14, 1991 through July 16, 1991. Respondent attempts to place all the liability for claimant's hearing loss upon the Workers Compensation Fund by alleging that respondent retained a handicapped employee during the period of injury and further alleges that said employee suffered a second injury during the same period in question. The Special Administrative Law Judge, in denying respondent's allegations, found that the evidence did not support a finding that it was more probably true than not that claimant's hearing loss was contributed to by the last month of employment with respondent. The Appeals Board agrees the medical evidence in the file supports that finding. Claimant's hearing loss was well documented as early as 1974. The tests performed on claimant in 1990 and again in

January 1991 indicated claimant's hearing had definitely worsened. It should be noted that during the thirty (30) day alleged injury date, claimant was required by the respondent to wear hearing protection in order to reduce the claimant's noise exposure to from zero to thirty (0-30) decibels. This would be well within the applicable OSHA standards.

The only medical evidence in the file comes from Dr. Jerry C. Freeman, an ear, nose, and throat specialist. Dr. Freeman is also a diplomate of the American Board of Otolaryngology, a fellow in the American College of Surgeons and a member of the Kansas City Society of Ophthalmology and Otolaryngology. Dr. Freeman found claimant's left ear hearing loss to be unchanged from January 1991 to May 1992. The change in the right ear during the same period was extremely small. Dr. Freeman opined there was no significant change to claimant's hearing during the one-month period June 14, 1991 through July 16, 1991, the alleged accident date.

K.S.A. 1991 Supp. 44-567(a) allows that when a handicapped employee is injured or disabled or dies as a result of "an injury" and the director awards compensation therefor and finds that the injury, disability or death resulting therefrom probably or most likely would not have occurred but for the pre-existing physical or mental impairment of the handicapped employee, all compensation can be assessed against the Workers Compensation Fund. In order for this statute to be applicable, the respondent must prove that the claimant was a handicapped employee and that the claimant suffered an injury, disability or death. The finding by the Special Administrative Law Judge that claimant did not suffer injury during the period of June 14 through July 16, 1991, is supported by the credible evidence. Thus, the respondent is not entitled to collect benefits from the Kansas Workers Compensation Fund, as no second injury occurred for which the Fund would be responsible.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated November 23, 1994, denying liability against the Kansas Workers Compensation Fund is affirmed.

All compensation, medical expenses and costs in this matter are to be borne by the respondent. The Kansas Workers Compensation Fund shall have no liability in this matter, with the exception that the Fund shall be liable for its own attorney fees.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Nora Lyon & Associates Transcript of Regular Hearing	\$176.30

Appino & Achten Reporting Service Deposition of Jim Eichelberger	\$312.60
Gene Dolginoff & Associates Deposition of Jerry C. Freeman, M.D.	\$337.50

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark S. Gunnison, Overland Park, KS
Larry R. Mears, Atchison, KS
Frank A. Caro, Jr., Kansas City, MO
William E. Hans, Kansas City, MO
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director